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CHARLES ELMORE CRO
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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 55.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Appellee.

BRIEF FOR APPELLANT.

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Appellee.

BRIEF FOR APPELLANT.

Opinion of Court Below and Grounds of Jurisdiction.

This case is here on appeal from a judgment of the Supreme Court of Appeals of Virginia, the highest court of that State, affirming an order of the Corporation Commission denying Appellant, a Delaware corporation, a certificate of authority to do an intrastate express business in Virginia in conjunction with its interstate business. The opinion of the Supreme Court of Appeals of Virginia is reported in 153 Va. 498 (150 S. E. 419), and is printed in full on pages 244-253 of the Record.

In accordance with paragraph 1 of Rule 12, Appellant, in due course, filed a Statement as to Jurisdiction on Appeal, and this Court on April 30, 1930, entered an order postponing consideration of the question of jurisdiction to the hearing of the case on the merits.

Statement of the Case.

Appellant was incorporated December 7th, 1928 under the laws of the State of Delaware to engage in the transportation of property by express over railroad lines in and between all of the States of the United States, the District of Columbia, Cuba, Hawaii, Canada, and Mexico (Rec. pp. 40-48). On January 25, 1929, Appellant applied informally for a certificate of authority to do business in Virginia as a foreign Express Company (Rec. p. 217). It did not seek to enter Virginia to transact a new business, but had succeeded to and was and is now conducting a business which has been carried on in Virginia for upwards of fifty years (Rec. p. 30). It is the successor of the American Railway Express Company, also a Delaware Corporation, which in 1918 was granted a certificate by the State Corporation Commission of Virginia, to do intrastate as well as interstate business in that State; it has assumed all of the liabilities of that Company, and has purchased all its property, real and personal, its offices and equipment, its wagons and trucks, and all its supplies, and has taken over its entire organization, and is transporting goods at the same rates and subject to the same Classifica-

tion and Tariffs previously in effect (Rec. pp. 137, 187, 188, 197). The Appellant is a joint agency of Railroads operating throughout the United States including in and across the State of Virginia, conducting the express transportation business in their behalf (Rec. p. 194). Ownership in the stock of Appellant is limited to Railroad Corporations (Rec. p. 45).

The business for the year 1928 produced gross receipts for the entire United States of $285,063,377.03; for the State of Virginia $5,324,949.11, of which approximately $4,682,999.25 represented interstate business, and $641,-949.86 intrastate business, that is, the business transacted in Virginia was 88 per cent interstate and only 12 per cent intrastate, and the Virginia intrastate business represented only ¼ of one per cent of the total express business in the United States (Rec. p. 139). The business of the Appellant, principally interstate, is handled by one organization, with one system of supervision, overhead and accounting and with the same personnel, property and equipment; if a separate corporation were required in Virginia, separate trucks and different employees would be needed for each company and there would be great confusion, and difficulty of segregation (R. pp. 137, 138).

The informal application of the Appellant for a certificate of authority to do business in Virginia as a foreign Express Company was refused, and on March 4, 1929, the application was formally renewed before the Corporation Commission and evidence taken on Appellant's right to be granted such certificate (Rec. p. 121). The application was based upon Chapter 158, sections 4027 to 4033 of the Virginia Code of 1919, that chapter relating exclusively to

foreign express companies, and upon sections 3845 and 3847 of said Code, as amended. On April 8, 1929, the State Corporation Commission refused a certificate of authority to Appellant to do an intrastate express business in Virginia; without prejudice, however, to the right of the Appellant to engage in interstate business in Virginia (Rec. p. 216).

An appeal was taken to the Supreme Court of Appeals of Virginia, and it affirmed the order or judgment entered by the State Corporation Commission of Virginia, and like the Corporation Commission based its judgment solely on an alleged prohibition contained in Section 163 of the Constitution of the State of Virginia, adopted in 1902 and found in the Code of Virginia, 1919, at page XCI (Rec. pp. 246, 247), reading as follows:

> "No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect; but any such foreign public service corporation, so engaged, shall not, without first becoming incor-

porated under the laws of this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or franchises in addition to such as it may own, lease, use or operate when this Constitution goes into effect."

The Supreme Court of Appeals of Virginia held that any foreign corporation not engaged in business at the time the Constitution of 1902 went into effect, could not exercise the powers of a Public Service Corporation intrastate in Virginia (Rec. pp. 244, 253, 254). It was suggested by the Supreme Court of Appeals, as it had been by the State Corporation Commission, that the Appellant might cause to be organized a corporation under the laws of the Commonwealth of Virginia to do intrastate business, and if it desired to do so then merge with such domestic corporation.

Appellant contended both before the State Corporation Commission (Rec. pp. 119, 120) and the Supreme Court of Appeals of Virginia (Rec. pp. 30-38) that it was lawfully entitled to do an express transportation business both interstate and intrastate in Virginia, and that a construction of Section 163 of the Constitution of Virginia denying to Appellant the right to conduct intrastate business was void and unconstitutional for that:

FIRST: It is repugnant to the Commerce Clause of the Constitution of the United States (Article 1, Section 8, paragraph 3) and the enforcement of the provision wholly to exclude the Appellant from transacting an intrastate business in Virginia would be a direct burden upon interstate commerce (Rec. pp. 260, *et seq.*); and,

SECOND: That it is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States guaranteeing to citizens the equal protection of the laws,

(a) In depriving Appellant of its right to institute suits in the Federal Courts and to remove suits from the State to the Federal Courts on the ground of diversity of citizenship (Rec. pp. 260, 261).

(b) By classification without any reasonable basis.

The Supreme Court of Appeals of Virginia denied a petition for rehearing on January 10, 1930, and the case was brought to this Court on appeal pursuant to Section 237 of the Judicial Code as amended, (United States Code Annotated, Title 28, Section 344), by the act approved January 31, 1928 (Chapter 14, 45 Stat. 54), as amended by the act approved April 26, 1928 (Chapter 440, 45 Stat. p. 466).

Specification of Assigned Errors to be Relied Upon.

Petitioner complains that the Supreme Court of Appeals of Virginia erred in affirming the order of the Corporation Commission denying to Appellant, a Delaware corporation, a certificate of authority to do an intrastate express business in Virginia in conjunction with its interstate business, and relies upon the assigned errors First to Sixth as the same are set forth on pages 259 to 264 of the record.

Summary of the Argument.

ARGUMENT.

POINT I. The Virginia Constitutional Provision as construed by the Supreme Court of Appeals of that State, denying the right of Appellant, to do an intrastate business, in conjunction with its interstate business, places a direct burden on interstate commerce, and is unlawful and void.

(a) The power of a State to exclude a foreign corporation to do intrastate business is not absolute; it is relative.

(b) The requirement of the State of Virginia must fall in order that interstate commerce be not unduly burdened.

POINT II. The decision is in conflict with the Constitution of the United States, guaranteeing to citizens the equal protection of the laws,

(a) In depriving Appellant of its right to institute suits in the Federal Courts and to remove suits from the State to the Federal Courts on the ground of diversity of citizenship.

(b) By classification without any reasonable basis.

ARGUMENT.

I.

The Virginia Constitutional Provision, as construed by the Supreme Court of Appeals of that State, denying the right of Appellant to do an intrastate business in conjunction with interstate business, places a direct burden on interstate commerce, and is unlawful and void.

(a) The power of a State to exclude a foreign corporation doing an interstate business is not absolute; it is relative.

The power of a State to impose conditions on foreign corporations desiring to transact business therein, when such corporations are engaged regularly in interstate or foreign commerce *is not absolute; it is relative.* Addressing itself to this point this Court said in *Western Union Telegraph Co.* vs. *Kansas*, 216 U. S. 1, at pages 33, 34:

> "It is true that in many cases the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce."

"We are aware that in *Paul* vs. *Virginia* (8 Wall. 168), this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Art. 4, Sect. 2. *That was not, however, the case of a corporation engaged in interstate commerce;* and enough was said by the court to show, that, if it had been, *very different questions would have been presented.*"

In the concurring opinion of Mr. Justice White, later Chief Justice, in *Pullman Co.* vs. *Kansas*, 216 U. S. 56, decided at the same time, he discussed this question and stated that as to foreign corporations engaged in the transaction of ordinary business the power of the State to exclude is *absolute;* whereas, as to corporations engaged in interstate or foreign commerce the power of the State is *relative*, stating at pages 68 to 70:

"As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, *and therefor no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business. The power to exclude in such a case being only relative, affords no warrant for the exertion by the State of an absolute prohibition.* * * * *Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a state law*

> *which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce and in conflict with the principles stated in proposition 1.* This follows, since the imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business. * * * It is to be observed that the conclusions just expressed take away from the States no lawful power. It leaves to the States the right to exert absolute authority where such power is possessed, and simply requires that where, as a result of the Constitution of the United States, the power is not absolute but is merely relative, not only the right of regulation *but likewise the right to exclude must be exerted conformably to the requirements of the Constitution of the United States; that is, in such a manner as not, either directly by the expression of a condition, or indirectly by its non-expression, to deprive of rights secured by that instrument.*" (Italics ours.)

The Appellant comes directly within the rule laid down by this Court in these cases. It is a Delaware corporation engaged in the transportation of property by express in and between all of the States of the United States, the District of Columbia, Canada, Mexico, Cuba and Hawaii; it is not seeking to transact a new business but has succeeded to a business which has been carried on for upwards of fifty years; a business which for the year 1928 produced gross receipts for the United States of $285,063,377.03;

for the State of Virginia $5,324,949.11, of which approximately $4,682,999.25 represented interstate business, and $641,949.86 intrastate business, that is, the Virginia business was 88 per cent interstate and 12 per cent intrastate, and the Virginia intrastate business was only ¼ of one per cent of the total express business in the United States.

The Supreme Court of Appeals of Virginia construed Section 163 of the Constitution of that State to prohibit Appellant to transact the Virginia intrastate business. To transact such business it would be necessary for the Appellant to conduct the Virginia intrastate express business through a separate corporation, requiring other property, real and personal, equipment, wagons, trucks, supplies and stationery, offices and employes; and a separation of the intrastate from the interstate business, a task quite impracticable, if not impossible (Rec. pp. 137, 138).

The business of the Appellant is nation wide, it consists principally of interstate commerce and the interstate and intrastate shipments are handled by the one organization, with the same personnel, and with one system of supervision, overhead and accounting. Appellant picks up packages at the residence, or place of business, of the shipper, carts them by motor truck or wagon to the railroad station, forwards them in railroad trains, to the destination, where again it carts the packages, and, thus delivers them to the consignees. As stated by this Court in *Western Union* vs. *Kansas, supra*, 216 U. S. 1, at page 37, "the local business for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by

domestic companies organized to conduct only local business." The necessity for the conduct of the business by one entity seems to have been conceded by the Chairman of the State Corporation Commission upon the hearing on Appellants' application, when he stated

> "* * * I don't see how you could set yourself up to do an interstate business, in the transportation business and not do an intrastate business" (Rec. p. 137).

If one of Appellant's vehicles calls at the place of business of a merchant in Richmond, Virginia, and the merchant has a package to be shipped to Washington, D. C., the petitioner may accept it for transportation, but if the merchant also has a package which he wishes to ship to Alexandria, Virginia, then under the decision of the Supreme Court of Appeals of Virginia, petitioner may not accept it because it is Virginia intrastate business. In the reverse direction if a shipper in Washington, D. C., wishes to ship a package to a merchant in Richmond, Virginia, the Appellant may accept it for transportation, but if a competing shipper in Alexandria, Virginia, similarly desires to ship goods to the same merchant in Richmond, the petitioner may not accept it. This is typical of the situation and illustrates the impracticability and additional expense of the conduct of the business by two separate corporations rather than by the one corporation, and, of course, it is particularly marked with respect to points on or near the border lines of the State and from points in the State to other points therein, so located that the shipments may in some instances be transported wholly within Virginia, and

in other instances may be carried in and out of the State, in the course of transportation.

The effect of the decision of the Supreme Court of Appeals, if it be permitted to stand, would be to deprive the appellant and the public of the benefits to be had from the handling of the local in conjunction with the interstate business and bring about a method of operation wholly impractical and utterly inconvenient. The Richmond merchant with a shipment for Washington, D. C. would have a vehicle of the Delaware corporation call for the package, and another vehicle of the Virginia corporation to call for the intrastate shipment. The shipper should not be required to pay the rates necessary to support two such services.

If the Delaware and the Virginia corporations should unite in handling the business by joint equipment there would be necessary the segregation of the expense of the state and interstate business. This is always difficult and expensive, and, generally impossible of accurate accomplishment. There would be such commingling of state and interstate business that it would be extremely difficult, if not impossible, to determine with respect to some transactions whether the Federal or the State laws governed, and whether the Federal or the State Courts would have jurisdiction, especially as to shipments between points in Virginia, which might move either over routes lying wholly within the State, or over routes which pass in and out of the State; *e. g.*, shipments of milk and cream from Harrisonburg, Virginia, to Norfolk, Virginia, and from Woodstock, Virginia, to Richmond, Virginia, have been handled intrastate via Staunton, Virginia, intrastate via Alexan-

dria, Virginia, and interstate via Washington, D. C.; *Express Rates on Milk and Cream Between Stations In Virginia,* 88 I. C. C. 687 (R. p. 137-38). The effect of the Virginia Constitutional provision as construed by the Supreme Court of Appeals, would be substantially to burden interstate Commerce, and, therefore, it is unconstitutional and void, although it may not have been intended by the State to enact an invalid law; *Ludwig* vs. *Western Union Telegraph Co.,* 216 U. S. 146, 162.

Nor does the suggestion of the Supreme Court of Appeals of Virginia that the Appellant organize a subsidiary corporation, and if it so desire then merge with such corporation, lessen or remove the burden upon interstate commerce. The corporation then would be a domestic corporation of the States of Delaware and of Virginia, and be subject to the laws of those States applicable to corporations organized therein. Not only would the interstate business done in connection with Virginia be subjected to the State Laws, but also the entire business of the petitioner throughout the United States amounting to upwards of $285,000,000 per year, would be subject to regulations which the State of Virginia might impose upon domestic corporations of that State. It would be necessary to have meetings of stockholders held in Virginia (Code 1919, Sec. 3786), to have its principal office in the State (Sec. 3784), and Appellant's money and intangible personal property would be subject to taxation by the State (Va. Acts of 1928, p. 150; Tax Law Sec. 219), and all of Appellant's operations throughout the United States, and foreign countries, would be subjected to other laws now in effect, or hereafter enacted, in the State of Virginia, applicable

to domestic corporations and the merged corporation would "thereby become a domestic corporation of this State and be subject to its laws, and to the jurisdiction of its courts * * *" (§ 3821, Va. Code 1919).

The Appellant has executed an indenture to the Guaranty Trust Company of New York, as trustee, providing for a total issue of $50,000,000 of bonds (Rec. pp. 197, 198), and with the approval of the Interstate Commerce Commission has issued $32,000,000 of the bonds (Rec. pp. 213, 214). As a Virginia Corporation it would be subject "to all the restrictions imposed upon corporations of the same class" (Virginia Code 1919, Section 3827), and could issue additional bonds only "after full compliance with the provisions of Section 167 of the Constitution of this State, so far as applicable" (*id.*)

The right to do the interstate business being unquestioned and indeed, unquestionable,—the Virginia Constitutional provision, as construed by the Supreme Court of Appeals, arbitrarily forbidding the Appellant to carry on with such interstate commerce, the local business, imposes a direct burden on interstate commerce, and is unlawful and void. *Pullman Company* vs. *Kansas*, 216 U. S. 56, 68.

Appellant urged before the Corporation Commission and in the Court below, *inter alia*, that Section 163 of the Virginia Constitution did not apply so as to require or justify the refusal of its application for certificate to do business in Virginia (Rec. pp. 14-24). The Section provides "* * * But this section shall not affect any Public Service Corporation whose line or route extends across

the boundaries of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect." Appellant contended that the Section was not applicable to it because, first, it was a corporation engaged in interestate commerce, and all of the lines or routes which it had contracted to use for the purpose of conducting an express business extended across the boundaries of the Commonwealth; and, second, that the clause "when this Constitution goes into effect" applied not to the time when the Company was incorporated, or to the time when it applied for a certificate to do business, but to the effective date of the Constitution and, therefore, excepted this Appellant as all of its lines or routes extended across the boundaries in 1902, when the Constitution became effective, except two small coal bearing railroads doing a negligible intrastate business (Rec. p. 139).

The State Corporation Commission, the body charged with the enforcement of this provision, in 1921 specifically adopted this view (Rec. p. 181); and it is to be observed that such construction renders the provision constitutional and valid, whereas, the construction of the Corporation Commission, and of the Court below, in the instant case, renders the section unconstitutional and void in imposing a direct burden on interstate commerce.

The opinion of the Court below cites, in support of its position, the cases of *Hemphill* vs. *Orloff*, 277 U. S. 537, *Pembina Mining Co.* vs. *Pennsylvania*, 125 U. S. 181, and *Ashley* vs. *Ryan*, 153 U. S. 436 (Rec. pp. 251, 253). These

cases are not applicable. *Hemphill vs. Orloff* and *Pembina Mining Co.* vs. *Pennsylvania* were cases of corporations engaged in ordinary business and not engaged in interstate or foreign commerce and, did not come within the class of corporations concerning which the power to exclude is only relative, *Pullman Company* vs. *Kansas*, 216 U. S. 56, 68, and, therefore, those cases do not support the validity of the Virginia Constitutional provision with respect to corporations which, like the Appellant, are engaged in interstate and foreign commerce. The case of *Ashley* vs. *Ryan*, 153 U. S. 436, likewise is not in point since it was there sought to consolidate a number of separate corporations into one corporation, and to become a domestic corporation of Ohio. There was no question of the right of a foreign corporation to do a business either interstate or intrastate in Ohio, but simply as to the conditions a State might impose with respect to the consolidation of a number of corporations into one domestic corporation. The Court specifically stated at page 446:

> "The question here is not the power of the State of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the State to determine upon what conditions its laws as to the consolidation of corporations may be availed of."

(b) The requirement of the State of Virginia must fall in order that interstate commerce be not unduly burdened.

For many years the express business was conducted by independent companies under contracts with the individual

Railroad Companies. Such contracts usually provided for a division of the revenue between the Express Company and the Railroad Company respectively on a percentage basis, or in the case of the most recent contracts, the uniform contracts with the American Railway Express Company—for a reasonable net return to the Express Company. This method of operation of the express business was criticized by the Interstate Commerce Commission; *In Re Increase in Express Rates*, 51 I. C. C. 263, 268; *Consolidation of Express Companies*, 59 I. C. C. 459, 469; *Express Contract, 1920*, 59 I. C. C. 518, 525, 528; *Express Rates, 1922*, 89 I. C. C. 297, 319, 320; and suggestions were made that the Railroads should hold the stock of the Express Company, or operate the express business themselves. When the time approached for the expiration of the Amended Uniform Contract with the American Railway Express Company, a plan was adopted providing for the future conduct of the express business through a separate agency, a joint facility of the Railroads, controlled by them through stock ownership. The Appellant was organized by the participating Railroads for that purpose, as a Delaware Corporation; the stock is owned and held by them, and may be sold only to Railroad Corporations, and its directors are composed of Railroad executives. A contract, covering a period of twenty-five years beginning March 1, 1929, was executed between the participating Railroads and the Appellant, appointing Appellant as the exclusive agent for conducting and transacting all the express transportation business on such Railroads. After the

expenses of the Appellant have been paid, the entire earnings are paid over to the participating Railroads upon the basis of gross revenue for each company, and the Express Company receives no net return (Rec. pp. 190 to 196).

Following investigation and hearing the Interstate Commerce Commission held in *Securities and Acquisition of Control of Railway Express Agency, Incorporated,* 150 I. C. C. 423:

> "* * * 2. That the acquisition by the participating railroads of control of the Express Agency by purchase of its capital stock will be in the public interest and that the consideration to be paid for the stock is just and reasonable; and, 3. That the proposed grouping of carriers and division of earnings in accordance with the terms of Article V of the proposed operating agreement *will be in the interest of better service to the public and economy in operation,* and will not unduly restrain competition, and that the consideration as between the carriers and the terms and conditions of said division of earnings are just and reasonable" (Rec. p. 201). (Italics ours.)

The express service is an integral part of the Railroad business; the Railroad Companies are required to furnish that service directly or through an agent; *Express Cases,* 117 U. S. 1. They have chosen to do so through the Agency of this Appellant, with the approval of the Interstate Commerce Commission, which specifically has held "* * * the acquisition of the control of the Appellant to be in the public interest, and that the proposed grouping of carriers and division of earnings provided in the operating contract will be in the interest of better service to the

public and economy in operation," and it follows necessarily that the requirement of the Constitutional provision of Virginia of incorporation of a separate domestic corporation to conduct the Virginia intrastate business, would defeat that purpose and impose an undue burden on a corporation engaged in interstate commerce as the price for handling the intrastate business incidental thereto.

Appellant operates in all of the States, and if Virginia might thus require incorporation, in addition to the incorporation in Delaware, so too could the remaining forty-six States, and the enormous resulting burden upon interstate commerce is too obvious to require more than mere mention.

> "Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation' * * * Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases, supra*, pp. 48, 51; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate*

Cases, supra, p. 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473."

Houston & Texas Ry. vs. *United States*, 234 U. S. 343, 350, 351, 352.

The business of the appellant is so intermingled that the supreme authority, the Nation, cannot exercise effective control over the interstate commerce without incidental regulation of the intrastate commerce. Hence such incidental regulation is not an invasion of State authority; *Wisconsin R. R. Commission* vs. *C., B. & Q. R. R. Co.*, 257 U. S. 588. In that case it is stated at page 588:

> "It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation

of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."

And at page 590:

"This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

See also *Dayton-Goose Creek Ry.* vs. *U. S.*, 263 U. S. 456, 485.

These decisions follow the principles laid down by this Court in *Western Union Telegraph Company* vs. *Kansas*, 216 U. S. 1, wherein it was said at pages 37 and 38:

"We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the State to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the

integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land."

Compliance with the requirement of the Virginia constitutional provision by incorporation of a separate corporation in Virgina, either with or without subsequent merger with the Delaware corporation, necessarily will add to the expense of conducting the interstate business, and, therefore, places an undue burden on interstate commerce. The converse of this situation was presented to this Court in *Colorado* vs. *United States, et al.*, 271 U. S. 153, where it was held that the Interstate Commerce Commission had authority to authorize abandonment, as respects both intrastate and interstate traffic, of a branch line of railroad, lying wholly within the State of the owning company's incorporation, upon the ground that local conditions were such that public convenience and necessity did not require continued operation, and that such operation would result in large deficits constituting an undue burden upon interstate commerce, and the Court stated at pages 162, 163:

"* * * The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from

making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

"The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own

financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

> *"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."* (Italics ours.)

It is, therefore, respectfully submitted, that the requirement of the Virginia Constitutional provision denying to Appellant, a Delaware corporation, the right to conduct an intrastate business in conjunction with its interstate business, places an undue burden on interstate commerce and must fall.

II.

The decision is in conflict with the Constitution of the United States, guaranteeing to citizens the equal protection of the laws.

(a) In depriving Appellant of its right to institute suits in the Federal Courts and to remove suits from the State to the Federal Courts on the ground of diversity of citizenship.

The power of the State to exclude foreign corporations from doing business therein is subject to the important qualification that the State may not exact as a condition of the corporation's engaging in business within its limits *that its rights secured to it by the Constitution of the United States may be infringed.* This rule has been laid down in a long series of decisions, and is very clearly and concisely stated by the late Mr. Chief Justice Taft, in the recent decision in *Hanover Fire Insurance Company* vs. *Harding*, 272 U. S. 494 and 507 as follows:

> "* * * It was settled in *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410, and *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, that foreign corporations can not do business in a State except by the consent of the State; that the State may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the State, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is, that the State may not

exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated, in respect of the breach of the commerce clause of the Constitution, by the cases of *Sioux Remedy Company* v. *Cope*, 235 U. S. 197, 203; and *Looney* v. *Crane Company*, 245 U. S. 178, 188. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts, has been held void, *Terral* v. *Burke Construction Company*, 257 U. S. 529 * * *."

Mr. Chief Justice Taft reiterated the rule, so often enunciated by this Court, that a State may not as a condition of doing business therein require a foreign corporation to waive its constitutional right of resort to the Federal Courts, citing *Terral* vs. *Burke Construction Company*, 257 U. S. 529, in which case it was said:

> *"The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."* (Italics ours.)

It may be urged that the Virginia Constitutional provision does not prohibit a corporation from exercising its constitutional right of commencing suits in or of removing suits to the Federal Courts, but it accomplishes that result indirectly by denying to Appellant, a Delaware corporation, the right to handle the intrastate business in Virginia and requiring the organization of a separate corporation under the laws of Virginia to conduct such intrastate business and then if it is desired to have both the interstate and intrastate business conducted by one corporation, a merger with the Virginia corporation, thus forming a new corporation "which said consolidated corporation shall, upon the payment of a proper charter fee, thereby become a domestic corporation of this State and be subject to its laws, and to the jurisdiction of its courts" (Secs. 3821-3827, Virginia Code) (Rec. pp. 242, 253).

The correctness of the statement that the Virginia Constitutional provision accomplishes indirectly that which it may not do directly is too obvious to require argument to support it, but it is interesting to note that the Supreme Court of Appeals of the neighboring State of West Virginia has held a somewhat similar statute to have that effect; *Rece, Admx.* vs. *Newport News & Mississippi Valley Co.*, 32 W. Va. 164 (9 S. E. 212). That case involved a statute of West Virginia which declared that foreign railroad corporations doing business in that State should be held and treated as domestic corporations, and required them to file an agreement to that effect. The Court held such agreement to be void, and that such foreign corporation might exercise such right in any proper

case notwithstanding its execution and filing of such agreement in pursuance of such statute. The Court said: .

> "Our statute (section 30, chapter 54, Code 1887) and the agreement of the defendant filed in pursuance thereof, do not, directly or in terms, stipulate that the foreign corporation shall or will not remove any suit from the state to the federal courts; but the statute does declare that the corporation filing such agreement shall be, 'as to its works, property, operations, transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings * * * as well as to all other matters relating to such corporation'; *and thus it does indirectly take from the corporation the right to remove into the federal courts any suits brought against it by a citizen of this State, because, as a domestic corporation, it can possess no such right.*" (Italics ours.)

The Virginia Constitutional provision goes farther; it denies entirely the right of the Appellant to do an intrastate business, and requires that a domestic corporation be organized to conduct that business and thus it accomplishes indirectly that which it has specifically been held may not be done directly. *Security Mutual Life Insurance Co.* vs. *Prewitt*, 202 U. S. 246, 269; *Pullman* vs. *Kansas*, 216 U. S. 56, 70. The State of Virginia may not lawfully deprive the Appellant of its constitutional right of resort to the Federal Courts by any law, rule, or regulation, and it may not do so directly or indirectly; *Terral* vs. *Burke Construction Company, supra; Barron* vs. *Burnside*, 121 U. S. 186; *Southern Pacific Company* vs. *Denton*, 146 U. S. 202, 207; *Barrow Steamship Co.* vs.

Kane, 170 U. S. 100, 110, 111; *Western Union Telegraph Co.* vs. *Kansas*, 216 U. S. 1; *Pullman* vs. *Kansas*, 216 U. S. 56; *Ludwig* vs. *Western Union Telegraph Co.*, 216 U. S. 146; *Herndon* vs. *C., R. & I. P. Ry.*, 218 U. S. 135; *Harrison* vs. *St. L. & San Francisco R. R.*, 232 U. S. 318; *Donald, Secretary of State of Wisconsin* vs. *Philadelphia & Reading Coal & Iron Company*, 241 U. S. 329; *Frost & Frost Trucking Co.* vs. *Railroad Commission of California*, 271 U. S. 583, 593-599.

In *Barron* vs. *Burnside*, 121 U. S. 186, at page 200 the Court stated:

> "* * * while a state may forbid a foreign corporation to do business within its jurisdiction or to continue it, it may not do so by imposing on the corporation a sacrifice of its constitutional rights."

See also *Hanover Fire Ins. Co.* vs. *Harding*, 272 U. S. 494, 514, *supra*.

Even in the case of foreign corporations not engaged in commerce the restrictions upon the right of entry into it by a State must not be repugnant to the Constitution or laws of the United States; *Lafayette Ins. Co.* vs. *French*, 18 How. 404; *Insurance Co.* vs. *Morse*, 20 Wall. 445.

In expressing views which were afterwards adopted in *Terral* vs. *Burke Construction Co.*, 257 U. S. at page 533, Mr. Justice Day in his dissenting opinion in the case of *Security Mutual Life Insurance Co.* vs. *Prewitt*, 202 U. S. at page 262, speaking of the case of *Barron* vs. *Burnside*, *supra*, said:

> "It is thus apparent that the decision was made to turn not upon the question of whether the agreement not to remove had been required in advance or im-

posed as a condition of remaining in the State after entry therein, but rested upon the doctrine that, conceding the right of the state to exclude foreign corporations, its right to do business within the state could not be conditioned upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and that the right to remove given to a foreign citizen or corporation was a right thus secured."

And again:

"The doctrine that the surrender of the rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a State is at war with that instrument, and if adopted or sanctioned by all the States would nullify the supreme law of the land in its essential provisions."

The case of *Herndon* vs. *Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 135, seems conclusive upon the point that the Virginia Constitutional provision is void on the ground that it is in conflict with the equal protection of the laws provision of the Federal Constitution. The Missouri Statute there considered provided that if removal to the Federal Court were attempted by a foreign railroad corporation, its certificate of authority to carry passengers or freight from one point in the State to another point in the State should forthwith be revoked by the Secretary of State, and its right to do such business should cease. It further provided that "the revocation of such certificate of authority or the cessation of such right shall not be deemed to prohibit or prevent such corporation from * * * making

what are known as *interstate* shipments and transportation."

In other words, the Missouri Statute did not revoke the right to do all business. It revoked only the right to do intrastate business, if the foreign railroad company exercised its federal right of removal of suits. Nevertheless, the statute was held unconstitutional and void. (*Herndon* vs. *Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 135.) In the instant case the Appellant may carry on its *interstate* business untrammelled by the State authorities, but it is denied the right to do its local along with its interstate business unless it causes a domestic corporation to be organized to conduct such local business, thereby being deprived of its Federal right of access to the Federal Court on the ground of diversity of citizenship.

The provision (Section 163) of the State Constitution, which, as construed by the Supreme Court of Appeals of Virginia, forbids Appellant to conduct with its interstate commerce a local business unless it causes a separate corporation to be organized, denies to such interstate commerce corporation the exercise of the Federal right of bringing suits in or of removing suits brought against it to the Federal Courts on the ground of diversity of citizenship, and thereby imposes a direct burden on such corporation engaged in interstate and foreign commerce, as the price to be paid by it for the privilege of doing local in conjunction with such interstate business. This is so because "the imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, * * * the exact equivalent of placing a

direct burden on its interstate commerce business." *Pullman Co.* vs. *Kansas*, 216 U. S., Concurring Opinion, at page 68.

(b) By Classification without any reasonable basis.

The equal protection of the laws has been denied to the Appellant by the construction given to Section 163 of the Constitution of Virginia, by the State Corporation Commission, and by the Supreme Court of Appeals, denying to Appellant the right to conduct the intrastate express business in Virginia in conjunction with its interstate business, and permitting other foreign corporations, similarly situated, to conduct the intrastate business in Virginia.

From 1914 to 1918 Wells Fargo & Company, a Colorado corporation, carried on an interstate and intrastate express business in Virginia without interference. In 1918 the American Railway Express Company, a Delaware Corporation, of which the Appellant is the successor, was granted a certificate under Sections 3485 and 3487 of the Code of Virginia, to carry on both interstate and intrastate business in Virginia (Rec. p. 137), and in 1921 the Southeastern Express Company, an Alabama Corporation, operating over the Southern Railway System, and its subsidiaries, was granted a certificate to carry on an express business, both interstate and intrastate in Virginia (Rec. p. 179), and it is today engaged in the conduct of such business, and is a competitor of the Appellant, which, at the same time, is denied the right to conduct an intrastate express business in Virginia. Such discrimination against Appellant rests upon no reasonable ground and, in fact,

appears to have no basis whatever to support it, and denies to Appellant the equal protection of the laws which the Federal Constitution guarantees.

Conclusion.

In the decision of the Corporation Commission it is said that to permit a foreign corporation to do an intrastate business would be "destructive of the power of the State to adequately regulate Public Service Corporations doing intrastate business in Virginia", (Rec. p. 232); but this is not true, because as to intrastate business the State has full powers of regulation, whether such business is carried on by a domestic corporation or a foreign corporation. It is not necessary for the State to take entire charge of the business of a corporation, state and interstate, in order to regulate the intrastate business. Appellant does not object to reasonable regulation of its intrastate business by the State. The Appellant has no disposition or desire to escape or avoid reasonable regulation. It has complied with the laws of the forty-six States, other than Delaware and Virginia, and has been authorized to and is conducting business therein as a foreign corporation. It sought similarly to do business in Virginia. It applied for a certificate of authority to do business in Virginia under the statutes which then appeared to it and now appear to it to be applicable, and it was and is ready and willing to comply with those statutes, and with any reasonable and proper requirements relating to the conduct of its business as a foreign corporation in Virginia, but it urges respectfully that the denial by the

Supreme Court of Appeals of Virginia, of its right to conduct the intrastate business in conjunction with its interstate business constitutes a direct burden on interstate commerce and is in conflict with the provision of the Constitution of the United States guaranteeing to it the equal protection of the laws, and, therefore, prays that the judgment of the Supreme Court of Virginia be reversed.

Respectfully submitted,

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Dated November 11, 1930.